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# Clarifying the Public-Private Line: Legal and Policy Guidance for Catholic-affiliated Charter Schools

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## Clarifying the Public-Private Line: Legal and Policy Guidance for Catholic-affiliated Charter Schools

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*In the past 50 years, the share of students enrolled in U.S. Catholic schools has declined from approximately 12% to 3%. In reaction, many urban Catholic schools have closed and subsequently reopened as public charter schools in order to receive governmental funding and to increase enrollment. As public schools, these Catholic-affiliated charter schools now face a complex set of legal and practical challenges. This article presents empirical research on Catholic-affiliated charter schools, and the legal issues facing them as well as the wider category of religiously-affiliated charter schools. The authors conclude by answering a number of questions that Catholic school leaders are likely to pose about this emerging trend in Catholic education.*

### Keywords

charter schools, school law, urban school closure, leadership

### Introduction

From the time of their height in enrollment in 1965, Catholic dioceses have closed over 1000 schools each decade, predominantly elementary schools located in urban areas (Brinig & Garnett, 2014; Meyer, 2007). Closed Catholic schools have displaced more than 300,000 students since 1990, costing taxpayers approximately \$20 billion as these students have been absorbed by nearby district schools and charter schools (Hamilton, 2008). Fifty years ago, Catholic schools educated 12% of the school-aged population (about 5.6 million) in nearly 13,000 elementary and secondary schools (Meyer, 2007). However, as of 2014, that number has dramatically declined, with only about 3% of the school-aged population (about 1.97 million) enrolled in 6,500 Catholic schools (NCEA, 2014).

Because Catholic schools have been threatened with financial difficulties and closure, they have adopted alternative organizational models (Center for Education Reform, 2011; Goldschmidt & Walsh, 2013; James, 2007; Nelson,

1994). Some approaches have included a shift from cost-based tuition, such as implementing models in which the diocese, parish, or philanthropists take financial responsibility for the school, thereby allowing parishioners to attend tuition-free and providing lower-rate tuition to non-parishioners. Other strategies have involved increasing tuition or accepting state-funded, need-based tuition vouchers. Some Catholic schools have even completely restructured. For example, schools have consolidated into consortiums to unify their administrative and financial operations, new schools have opened that are operated by particular religious orders, or have been formed from Catholic homeschooling groups (Cruz, 2009; Goldschmidt & Walsh, 2013; Pattison, 2010).

This article will focus on another approach gaining acceptance in recent years—the closure of financially-struggling urban Catholic schools and subsequent reopening as public charter schools (Brinson, 2011; Carr, 2014; Goldschmidt & Walsh, 2013; Horning, 2013; McShane & Kelly, 2014; Mulvey, Cooper, & Maloney, 2010; Smarick, 2009). This option is a divergence from the others as it prohibits the possibility of the school remaining Catholic during school hours. As a public school receiving state and federal funds, the religious identity and culture of the school must be removed, though maintaining a relationship with the parish or diocese is possible (Carr, 2014; Brinson, 2011). The closure of urban Catholic schools and their subsequent reopening as charter schools has emerged within the past decade, and although empirical studies about these schools exist, the research is in its infancy and is limited (see, for example, Brinson, 2011; Carr, 2014; McShane & Kelly, 2014; Smarick, 2009). Notably, no litigation has emerged concerning Catholic-affiliated charter schools, while religious-affiliated charter schools in general have faced some litigation (Decker & Carr, 2015). We will refer to public charter schools operating on the grounds of a Catholic parish or in buildings that once housed Catholic schools as “Catholic-affiliated charter schools” (“CCS”). These schools have likely removed Catholic symbols, curricula, and traditions during school hours; yet, they remain affiliated with Catholicism because of their location and ties to previous Catholic school employees, families, and students. They are also sometimes referred to in the literature as “conversion” charter schools. However, in most cases, the previous Catholic schools have entirely closed, and the succeeding charter schools are indeed “new” schools.

Despite the initial desirability of state and federal funding available to Catholic schools that close and reopen as charter schools, Catholic school

leaders should be fully aware of the many practical and legal challenges that CCS face. To that end, the purpose of this article is to discuss the emerging issues confronting CCS and to answer a number of common questions Catholic school leaders are likely to pose. First, we review what is known from the empirical literature on the small number of studies about CCS. Second, we explain the legal issues facing religiously-affiliated charter schools. Finally, based on the existing empirical and legal information, we provide legal and practical guidance to Catholic school leaders considering this change.

### **Empirical Literature Examining Catholic Schools that Have Become Public Charter Schools**

Parishes in at least ten major cities (Pittsburgh, San Antonio, Washington, DC, Miami, St. Louis, Denver, Indianapolis, New York, Baltimore, and Chicago) have closed financially distressed Catholic elementary schools and opened public charter schools in their places (Carr, 2014; Crouch, 2010; Goldschmidt & Walsh, 2013; McShane & Kelly, 2014; Mulvey et al., 2010). The new schools have varied in their staffing and structures as compared to the previous Catholic schools. Several have re-hired the same administration and/or teaching staff and have used or leased the prior Catholic school buildings (Brinson, 2011; Carr, 2014; Smarick, 2009). In many ways, the new Catholic-affiliated charter schools (CCS) are identical to the prior Catholic schools, with the exception of the removal of religious ties to the church (such as attending school mass or sacramental preparation), religious curriculum, and Catholic icons in and around the building during the school day. Additionally, many families have remained at the new CCS (Brinson, 2011). Most schools have maintained a school uniform policy and have aimed to keep class sizes low. Additionally, most schools have enacted character education programs in order to offer a value-based curriculum that appeals to parents and the community (Carr, 2014; Smarick, 2009).

### **Shifts in Contemporary Catholic Schooling**

To understand the context surrounding CCS, it is important to note that there has been a shift in the mission of contemporary U.S. Catholic schooling (Center for Education Reform, 2011). Heft (2011) recognized that the move of middle class Catholics out of the cities created a crisis in the identity and mission of urban Catholic schools. Brinig and Garnett (2010; 2014) also noted this demographic change and explained two resulting consequences.

First, urban parishes have begun to educate an increasingly non-Catholic student body. Low-income and non-white families living in city centers have chosen Catholic schools as an alternative to the urban public schools (see also Meyer, 2007). Secondly, middle class Catholics in the suburbs have elected to send their children to the suburban public schools instead of Catholic schools. These two changes raise questions over the goals and resources for contemporary Catholic schooling (Brinig & Garnett, 2014; Heft, 2011; James, 2007). Is the primary purpose of a Catholic education to impart the Catholic faith, or do other advantages proceed from Catholic schools? And, how will urban Catholic schools financially survive as more families selecting the schools are low-income and priests and nuns no longer staff the schools at low costs?

Nearly 30 years ago, Veverka (1988) emphasized similar matters over the survival of Catholic schools. She pointed to both the purpose of the school for teaching a Catholic worldview and also to the emerging belief that Catholic schools could be an instrument for the common good as an alternative to the public school. Thus, when Catholic schools in inner-city parishes have been forced to consider closure, keeping the schools open as public charter schools has been viewed as one way to continue serving parish families, the community, and what leaders consider to be the common good (Brinson, 2011; Smarick, 2009).

### **Empirical Studies**

The empirical research surrounding the modern changes in urban Catholic schooling is limited, but includes two detailed case studies that documented the closure and initial reopening of several urban Catholic schools in Washington, DC (Smarick, 2009) and in Miami, Florida (Brinson, 2011). The studies revealed challenges within four levels of constituencies: the Archdiocesan or diocesan level; the school and parish administration; the school teachers and staff; and, the families and interested groups from the outside. Stakeholders from each of the four groups articulated key obstacles or doubts many had with regard to the opening of the new charter schools in Washington, DC and in Miami. While the challenges did not halt the start of the new schools, their presence indicated that not all vested groups favored the conversion.

Brinson (2011) and Smarick (2009) interviewed several of these constituents (Archdiocesan officials, principals, teachers, and parents) and found that nearly all had misgivings about the charter schools, but that most were

committed to the new schools for the sake of the students. The loss of the spiritual and religious identity of the Catholic schools was one concern that permeated all levels of stakeholders. Many felt the lack of outwardly visible faith within the buildings, curriculum, and relationships among staff and families would weaken the schools (Smarick, 2009). Some additional themes concerning challenges or important facets to the Catholic school closures and charter school openings are described below.

**The Archdiocesan/diocesan level.** Concerns at the level of the Archdiocese/diocese converged around granting oversight to local churches over the charter school opening and the relationship among the diocesan level administration and the new schools' charter management organizations (CMOs). Certain Miami churches were given permission by the diocese for the parish priests to explore charter school options on their own (Brinson, 2011). This enabled the local priest, who often oversaw the financial and overall operations of the school, to maintain some oversight and exercise of choice in the school conversion process. Additionally, many former staff members of the Washington, DC area Catholic schools' consortium went on to hold positions within the new CMO that oversaw the charter schools (Smarick, 2009).

**Parish and school level administration.** Interests at the individual parish level likewise involved the relationship the priest and parish would have with the charter school once the new school was functional, or the voice of parish members in choosing among charter school options or alternatives. An overall theme of continuity in service and relationships with the schools and families appeared important to the parish priests and school administration of the former Catholic schools. However, in one example, the inclusion of the parish might have been considered superficial at best. These parish members and Catholic school families had only six weeks to formulate an alternative to closing and opening a charter school. Yet, in the Miami charter schools, some parish priests and parish councils met regularly with leaders of the new schools' CMOs which fostered a sense of connectedness and continuity between parish and charter school (Brinson, 2011). Another sentiment of school administration and parish priests concerned the relief both had in knowing that, ultimately, their school would not be closing its doors to the many families that had attended the Catholic schools for years.

**Teachers.** The loss of Catholic school identity was difficult for many stakeholders. This change in the schools' religious character was one of the most important facets for the teachers involved in the Washington, DC conversion schools (Smarick, 2009). However, many teachers considered their

jobs as more than just work; both the Miami and DC teachers used the word "service" when describing teaching. As a result, many stayed on in the charter schools because of their commitment to serving the children through education. Yet, several teachers in the Miami area charter schools considered the Catholic school closures a shock since they had previously committed their teaching careers to parochial schools (Brinson, 2011). Of those that did stay to teach in the Miami charter schools, many eventually departed because of the changes that occurred at the school level when charter school policy met with actual practice in the classroom. Some teachers reported conflict and difficulty with larger class sizes, co-teaching models, a larger focus on the state standardized tests and accountability systems, and an increased level of principal involvement in classrooms (i.e., observations and teachers' evaluations).

**Families and vested interest groups.** School families (parents/guardians and students) and vested interest groups such as Black Catholics United (BCU) and the National Catholic Educational Association (NCEA) expressed concerns over the school conversions. Some communicated feelings of abandonment on the part of families who wanted a Catholic education for their children but could not afford it (Smarick, 2009). However, many families in Washington, DC and Miami stayed on because of the continuity with teaching staff, the familiarity of the building, and the small school size. When comparing the DC and Miami student bodies within the first year of the new charter schools, only 30 to 40% of the DC students remained from the former Catholic schools whereas 75% or more of the Miami students (many Washington, DC Catholic school students came from surrounding Maryland and Virginia and could no longer attend the DC charter schools once they became public). Both sets of charter schools served a poorer student body with increased needs for special services. Lastly, the BCU and NCEA had concerns that the Archdiocese gave too little time for schools to formulate alternates plans, and feared that there would be a tendency for all financially struggling Catholic schools to immediately close and become charter schools if the DC and Miami schools succeeded with the charter school openings.

Extending the findings from Brinson (2011) and Smarick's (2009) studies, Carr (2014) conducted a qualitative case study of two Midwestern CCS during their third year of operation and found that the charter schools grew increasingly dissimilar from the prior Catholic schools as time elapsed. Carr conducted interviews with Archdiocesan officials, school leaders, and teachers across the two CCS. She also collected data through shadowing the two charter schools' principals and observing the charter schools' classrooms,

faculty meetings, and board meetings. Finally, she compared the demographic, enrollment, achievement, and retention data of the preceding Catholic schools with the new CCS. Carr found that though enrollment increased for both charter schools, achievement fluctuated below the state average, prior teachers and administrators from the Catholic schools departed from the schools over time, student participation in after-school faith formation classes was reported to have decreased, and new teachers and families enrolled who had little experience with the prior Catholic schools or parish. As compared to the former Catholic schools, many school staff members reported negative shifts in school climate, collegiality, and few opportunities for sharing leadership in the governance of the CCS.

Carr's (2014) findings also indicated that several changes were made prior to the opening of the charter schools that indicated apprehension on the part of Catholic school officials of probable church/state entanglement. The officials based their decisions on legal advice provided in light of past court decisions that found unconstitutional religious entanglement at traditional public and charter schools. The legal advisors of the CCS also warned of the potential for future litigation. Thus, prior to opening the CCS, the officials modified the following:

- physical property at the schools (formed leases, constructed new facilities, and removed religious icons including limestone crosses on one building's façade);
- curricula (removed religious education from the school day and offered character education instead, and provided optional faith formation classes after school);
- personnel (changed hiring practices to no longer prefer Catholic teachers, however contracted with the prior Catholic school network as an education service provider to supply instructors at the charter schools); and
- advertisements (the promotion of Catholic-affiliated after-school activities including faith formation classes).

After opening the CCS, Catholic officials discovered that many additional legal and practical questions arose. For example, CCS officials posed the following questions:

- What were the legal parameters when the church and CCS both wanted to fund and use a newly constructed facility?
- How should the CCS appropriately accommodate the free exercise of students' and teachers' faith backgrounds?
- Should prayer led by the Catholic education service provider be included at faculty meetings?

- Could CCS employees recommend that students attend the after-school faith formation classes?
- Could teachers include classroom instruction on religious celebrations? and
- How should the CCS respond to the new challenges of providing federally-mandated special education for newly enrolled CCS students?

The education of students with disabilities was one of the largest concerns after the opening of the two CCS. Several administrators and teachers who had taught previously in the Catholic schools highlighted challenges that were associated with newly enrolled students' behavioral and education needs. The prior Catholic schools admitted smaller numbers of students with special needs; however, the charter schools now faced the same challenges that many public schools face. As public schools, they were required to admit every student who wished to enroll if there were openings (in the case of more applicants than spaces available, a lottery was held). Further, the CCS had to adhere to the myriad of legal protections and entitlements afforded to students with disabilities under federal law. However, unlike their traditional public school counterparts, the charter schools were small in size which meant they lacked the resources to properly support these new students with disabilities. One administrator confided, "one student with severe vision or hearing needs could bankrupt us."

Indeed, as indicated by the existing empirical literature, CCS have faced significant challenges in structures, curriculum and instruction, school culture and identity, and student body needs.

### **Legal Issues Facing Religiously-affiliated Charter Schools**

Similarly, the legal research about religiously-affiliated charter schools identifies a multitude of complex church-state entanglement issues that make these schools vulnerable to litigation. The mere existence of religiously-affiliated charter schools seems to be in conflict with the constitutional doctrine calling for the separation of church and state. Yet, a closer examination into the relevant law surrounding religion in schools reveals that the line separating church from state is sometimes quite blurry (Mulvey et al., 2010).

### **Overview of the Relevant Law**

Pursuant to the U.S. Constitution, the First Amendment provides two counter-balancing religious clauses. The Free Exercise Clause protects individual religious freedom while the Establishment Clause prohibits govern-

mental endorsement of religion. Fox, Buchanan, Eckes and Basford (2012) explained that the dichotomous tension between these two clauses creates confusion in public schools. On one hand, public school employees must comply with the Establishment Clause by avoiding actions that could be interpreted as favoring one religion or religion in general. On the other hand, under the Free Exercise Clause, public school employees also must avoid any policy or practice that would prohibit the free exercise of students and employees from practicing their religion. The First Amendment's Free Speech Clause further complicates the issue because the U.S. Supreme Court has used a freedom of speech analysis to determine that public schools must not censor private religious expression including the after school use of public school facilities for religious meetings (*Good News Club v. Milford Cent. Sch.*, 2001).

In fact, there is a long line of U.S. Supreme Court precedent that analyzes whether public schools and other governmental organizations have violated these constitutional principles. The Court applies three tests to determine whether a church-state violation has occurred: (a) the *Lemon* test; (b) the Endorsement test; and (c) the Coercion test. The *Lemon* test asks whether the governmental practice or policy (a) has a secular purpose; (b) advances or inhibits religion; or (c) creates an excessive governmental entanglement with religion (*Lemon v. Kurtzman*, 1971). For example, the Court applied the *Lemon* test in *Agostini v. Felton* and found that parochial schools could receive federal funding (Title I) without violating the excessive entanglement prong of the test (1997). The U.S. Supreme Court applied the Endorsement test beginning in the late 1980s to examine whether a governmental practice or policy endorses or disapproves of religion (*Cnty. of Allegheny v. American Civil Liberties Union*, 1989). In 1992, the Court began also applying the Coercion test that asks whether the governmental practice or policy coerces others to subscribe to or participate in a certain religious or faith-based tradition (*Lee v. Weisman*, 1992). According to McCarthy, Cambron-McCabe, and Eckes (2014) all three tests are used by courts today; however, the *Lemon* test appears to be losing favor, especially the "excessive entanglement" prong (p. 24-25).

When these tests are applied to public school settings, the U.S. Supreme Court has held that public schools must respect the separation of church and state. For example, schools cannot sponsor prayer (even when it is non-denominational) (*Engel v. Vitale*, 1962); force a student to recite the Pledge of Allegiance (*W. Va. State Bd. of Educ. v. Barnette*, 1943, p. 642); display the Ten

Commandments (*Stone v. Graham*, 1980); or allow religious leaders to provide religious instruction at school (*Illinois ex rel. McCollum v. Board of Educ. of Sch. Dist. No. 71*, 1948). At the same time, public schools must allow for the free exercise of religion. They are required to allow students to leave early to attend religious instruction at parochial schools (*Zorach v. Clauson*, 1952). They cannot prohibit religious student and community groups from meeting if they permit facility access to other groups (*Bd. of Educ. of Westside Cnty. Schs. v. Mergens*, 1990; *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 1993). Additionally, the U.S. Supreme Court has permitted parochial schools to receive governmental funding (e.g., Title I funding) when it benefits the individual child and not the nonpublic schools (*Cochran v. State Bd. of Educ.*, 1930). In sum, school-sponsored religious expression is usually prohibited; whereas, student-initiated religious expression is typically protected. To illustrate, it would be illegal for a public school teacher to lead a class in prayer, but it would also be a violation of the First Amendment if a teacher prohibited a non-disruptive student from praying. Further, teachers cannot proselytize to students (*Marchi v. Bd. of Coop. Educ. Servs.*, 1999), but they can teach about the Bible and other religious texts from a historical, literary, or cultural perspective (*Abington Sch. Dist. v. Schempp*, 1963).

### Overview of the Research about Religiously-affiliated Charter Schools

As illustrated by the legal precedent, distinguishing what is legal and illegal can be challenging even in traditional public school environments. It becomes even more complicated with public charter schools that are affiliated with religion such as CCS. To help clarify the legal tensions, the United States Department of Education (U.S. DOE) issued non-regulatory guidance for the Charter Schools Program (CSP) in 2014. It discussed six areas where charter schools must be cautious not to violate the Establishment Clause including: (a) leasing buildings from churches; (b) contracting with religious organizations for secular programming and teaching; (c) marketing charter schools at churches; (d) marketing church events at charter schools; (e) reopening private, parochial schools as charter schools; and (f) teaching religiously-related concepts (U.S. DOE, 2014).

Scholars have also offered legal guidance relevant to religiously-affiliated charter schools. Fox and colleagues (2012) warned of potential lawsuits; whereas, Decker & Carr (2015) analyzed the existing litigation surrounding religiously-affiliated charter schools. To reach their findings, Fox et al. reviewed “ethnocentric” charter schools—or those that focus on cultural

education—including schools focused on the Hawai’ian, Islam, and Hebrew cultures. They discussed potential legal issues surrounding these schools since cultural traditions are often closely tied to religion. Fox et al. determined that lawsuits could be filed against ethnocentric charter schools based on the presence of voluntary or school-sponsored prayer during school hours; the use of religious curricula such as the Bible and Koran; the accommodation of students’ religious practices including food, clothing, and the separation of students by gender during religious holidays; the leasing of space from religious organizations; displays of religious information or icons; and the offering of after-school religion classes within the school buildings.

Decker and Carr (2015) reviewed the existing litigation surrounding religiously-affiliated charter schools. After reviewing a sample of 85 cases, they identified 7 cases involving existing or proposed religiously-affiliated charter schools. All but two of the cases arose when schools were connected with a particular religious organization, such as a church. The lawsuits alleged explicit religious entanglement including one case where an Islam-affiliated charter school was accused of illegally endorsing Muslim dress and dietary practices (*Am. Civil Liberties Union of Minn. v. Tarek Ibn Ziyad Acad.*, 2010). Religious charter schools were also challenged for implicit religious entanglement, including schools that had leased space from churches (*Porta v. Klagholz*, 1998). The authors found that the three charter schools affiliated with Christianity prevailed; whereas, the two affiliated with non-Christian religions such as Islam were less successful. There were 11 additional cases that did not challenge specific schools, but challenged governmental funding allocated to school choice programs including voucher programs. In each of these cases, courts determined that the governmental financial support did not violate the Establishment Clause. Decker and Carr (2015) hypothesized that there were only a limited number of cases brought against religiously-affiliated charter schools due to their short history thus far (only 24 years have passed since the first charter school law in 1991). Additionally, they also hypothesized that the limit number of cases may be a result of the possibility that religiously-affiliated charter schools have become better informed and perhaps hyper-vigilant at avoiding church-state entanglement. Moreover, traditional public school districts and parents may not be motivated to challenge religiously-affiliated charter schools because parents may appreciate the additional choice and districts may lack the resources to instigate lawsuits. At the same time, Decker and Carr predicted that more lawsuits are probable as the limited public funding continues to be divided between traditional public schools and charter schools.

Finally, Decker & Carr (2015) provided six recommendations to prevent future legal challenges. First, leaders of religiously-affiliated charter schools should not be unnecessarily worried about being sued because the relevant litigation only includes a small body of lawsuits filed against proposed or existing religiously-affiliated charter schools. On the flipside, if the charter schools are affiliated with religions other than Christianity, they *may* be scrutinized more carefully than Christian-affiliated charter schools. Additionally, challenges may arise if religiously-affiliated charter schools appear to be entangled with religion (e.g., prayer on campus). Therefore, religiously-affiliated charter schools should avoid close ties to particular religious entities such as a specific religious organization. Teachers at religiously-affiliated charter schools must also only teach about religion from a historical, literary, or cultural perspective. Finally, school leaders should ask attorneys to educate the entire staff about the nuanced issues surrounding religion in public schools.

### **Legal and Practical Guidance**

A review of the literature highlights that urban Catholic schools are struggling financially and closing at an increasing rate. To avoid potential closure and loss of their historic presence in their inner-city neighborhoods (see Brinig & Garnett, 2014), many Catholic school leaders have decided to open public charter schools after closing their existing Catholic school. However, the empirical and legal research identifies that this solution is not a quick fix. Instead, the Catholic-affiliated charter schools (CCS) that have emerged appear to face significant practical and legal challenges. We suggest, therefore, that Catholic school leaders should be fully aware of these challenges facing CCS. To that end, we analyzed the empirical and legal literature to compile the following list of questions and answers relevant to the closure of urban Catholic schools and the subsequent reopening of public charter schools. Some of our guidance outlines what CCS *must* do to comply with the law. However, some of our guidance covers issues where the legal parameters are not yet clearly outlined. In those instances, we provide our opinion of what CCS *should* do in order to avoid public and judicial scrutiny and ensure CCS are proactively avoiding church/state entanglement. As illustrated by the church/state precedent, the individual facts matter and therefore, Catholic school leaders should also consult an attorney to carefully analyze each school's unique circumstances.

**Can a Catholic school simply convert to a charter school and receive public monies?**

It depends on your state charter school laws regulating the conversion of private schools to public charter schools. Multiple state statutes explicitly prohibit conversion of private to public charter schools including those from California, Delaware, Georgia, Illinois, Massachusetts, Ohio, Pennsylvania, Rhode Island, Tennessee, Wisconsin, and Wyoming (Decker & Carr, 2015). Moreover, in order to receive *federal* CSP funds, the answer is no. According to the U.S. DOE (2014), for purposes of the CSP, a charter school must be newly created or adapted from an

existing public school. There is no provision in the law that recognizes conversions of private schools into public charter schools. However, the statute does not prohibit a newly created charter school from using resources previously used by a closed private school, including hiring teachers or enrolling students from the closed private school. (p.ii)

In general, a private school must first close, and then a new charter school can be formed, allowing the charter school to receive federal CSP funds at its opening. Most charter schools function at a deficit in their first year because charter school funding is not received until after the school is operational and students are counted and reported. In the example of the Washington, DC area CCS, the CMO rejected CSP funds before the charter schools opened because the schools would be forced to hold a lottery thereby risking the guaranteed enrollment of its previous Catholic school students (Smarick, 2009).

**What changes to the physical building should we make before reopening as a charter school?**

Before the opening of the charter school, school employees should remove or cover all religious iconography. If the same building is being used as a charter school as was in use as a Catholic school, there is likely religious stonework in the building's architecture, or within the building in the forms of statues, crucifixes, and icons. All of these icons should be removed or covered. Catholic school leaders should be aware that Carr (2014) found that the removal of religious items deeply affected and grieved several Catholic school teachers who were planning to continue working in the charter school. Teachers attributed meaning and deeply-held cultural beliefs to these reli-

gious symbols, which they felt were quickly cast aside in the school closure and reopening as a CCS, thereby negatively impacting the charter school's climate.

Additionally, some churches will request to continue to use the religious iconography. For instance, if the charter school is leasing space from the church, the church may plan on using the charter school classrooms outside of school hours for catechesis and/or church meetings. Further, some items are not easy to remove or cover (e.g., religious stonework in the building's façade). Thus, prior to deciding to become a CCS, Catholic school leaders should fully consider the costs and complications of using the existing Catholic school building to house the future charter school.

### **Is it illegal for us to lease space from the Church?**

No, according to past litigation, courts have applied the *Lemon* test and found that as long as the primary purpose of the school is to advance a secular education, the leasing of church space is not illegal. In *Porta v. Klagholz*, (1998), a federal district court found no legal violation when a taxpayer alleged that two charter schools were illegally holding classes in space leased from churches. The court reasoned that the leases alone did not violate the Establishment Clause, concluding that both schools had a secular purpose of educating children which did not have "a principal or primary effect that either advances or inhibits religion" (p. 297). However, in a case where a Presbyterian Church was applying to hold the charter for a school operating on its grounds, the church was denied its charter application because the Presbyterian Church was not primarily organized as an educational entity (*Brookwood Presbyterian Church v. Ohio Dept. of Educ.*, 2013). The diocese in Carr's (2014) study faced a similar challenge in the planning phase and created a secular CMO to manage the two CCS separate from the church.

The U.S. DOE (2014) guidance specifies that the church space made available to a charter school must remain non-religious in its "programs, operations, and physical environment" (p. 23). To avoid complications, the two CCS in Carr's (2014) study had leases that attempted to spell out exactly when the space would be used by the charter school. The leases specified that on school days, the charter school would have complete occupancy from 6:30am through 3:30pm. Then, from 3:30pm to 6:00pm the CCS and church would share the space. In addition to ensuring the lease is carefully-crafted, CCS leaders should ensure the rental amount charged to the charter school is

indicative of the fair market value (*Pocono Mountain Charter School v. Pocono Mountain School District*, 2014).

**How do a church and charter school share construction that was partly funded by governmental funds from the charter school?**

This question remains an evolving issue faced by CCS without clear guidance from the courts. Nonetheless, in 2014, the Pennsylvania Commonwealth Court analyzed this issue in *Pocono Mountain Charter School v. Pocono Mountain School District* (2014). The charter school was located on the grounds of the Shawnee Tabernacle Church and leased its facilities from the church. The court was not critical of the shared space; however, it did criticize the construction of a new \$125,000 gymnasium for the charter school that had the name of the church imprinted on its floor. The school district revoked the charter based on illegal religious entanglement as well as many other issues. Ultimately, after a long and tumultuous lawsuit, the State Charter School Appeals Board followed the court's directives and upheld the district's revocation. As a result, the school closed in June 2014 and received national notoriety (Kelly, 2014). In Carr's (2014) study, one CCS constructed a new building with state and parish funding. Staff from both entities (church and charter school) desired to utilize the structure, yet creating agreements over space, utilities, and time were fraught with tension.

**Can we admit most of our previous Catholic school students without entering them into the charter school lottery?**

Lotteries only come into play if you have more students seeking enrollment in your charter school than there are spots available. If that occurs, you must follow your respective state law regarding lotteries. Additionally, if your charter school is receiving federal funds via the Charter School Program (CSP), certain stipulations surrounding lotteries exist (U.S. DOE, 2014, p. 17-21). You cannot treat prospective students differently based on their religion or lack thereof, so, if your school plans to use CSP finances as start-up funding, you could not ensure that your prior Catholic school students become charter school students if there are more students wanting to enroll at your charter school than seats available.

**Can we still hire Catholic school teachers?**

Yes, but as a public school, you cannot give preferential or discriminatory treatment to employees based on their religious affiliation or lack thereof

(Civil Rights Act, 1964). Therefore, during the interviewing process, you cannot discuss religion. After employment, if you treated employees differently based on their religion, this would also be a legal violation. In Carr's (2014) study of two CCS, several participants reported a lack of understanding among new teachers of the history or traditions of the prior Catholic schools once they became charter schools. Bryk, Lee, and Holland (1993) reported one of the factors in the success of the Catholic schools in their study was the active and enthusiastic involvement of lay persons who taught and led activities in the schools. But as public charter schools, the religious backgrounds of teachers cannot be a deciding factor in staffing the schools. Thus, as schools age and new teachers are hired, the likelihood of retaining a lay Catholic staff decreases.

### **Can we teach religion?**

Yes, but only from a cultural, literary, or historical perspective (*Abington Sch. Dist. v. Schempp*, 1963). For example, there are many Hebrew *language* schools in existence that focus on teaching language, not religion (see e.g., Hebrew Charter School Center, 2014). Additionally, school employees cannot proselytize or otherwise endorse religion (*Marchi v. Bd. of Coop. Educ. Servs.*, 1999). In fact, *Alzubi v. American Islamic Institute of Antelope Valley*, a California state appellate court upheld the dismissal of a teacher who had been fired at an Islam-affiliated charter school because he was proselytizing in his classroom (2006).

### **Can teachers, parents, or students pray during school hours?**

It depends. The individual facts determine whether praying during school hours is legal. As long as they are not disruptive, students have a legal right to pray under the Free Exercise Clause and its related precedent. Prayer involving teachers during the school day would be more problematic. If a teacher was privately praying (e.g., before students arrived in the morning), then it may be fine. However, teachers cannot lead or participate in prayer with students or when students are present, even if the teachers are doing so during non-instructional time on-campus (e.g., over the lunch break). For example, in 2009, the American Civil Liberties Union of Minnesota (ACLU) filed suit alleging that a charter school, Tarek ibn Ziyad Academy (TiZA), its sponsor, and many of its employees had advanced, endorsed, and preferred Islam (*Am. Civil Liberties Union of Minn. v. Tarek Ibn Ziyad Acad.*, 2011). Among AC-

LU's claims was that the TiZA allowed prayer to be posted in the entryway of the school, religious materials to be posted in the classrooms by teachers, and prayer sessions to occur during school hours with teacher participation. In 2012, a federal district court approved a settlement agreement by which one school leader had to reimburse the state \$17,500 and three school leaders agreed to not serve in leadership positions in Minnesota charter schools for three years (*Stipulated Settlement Agreement Between Plaintiff and Defendant Asad Zaman*, 2012). Ultimately, TiZA closed (Koumpilova, 2011).

The participation of parents in prayer during school hours may be permissible. For example, a charter school contained a parent room that was open to multiple parent groups, including a group of mothers who used the room for prayer (*Daugherty v. Vanguard Charter School Academy*, 2000). While the plaintiffs challenged the constitutionality of this practice, the court found that the school policy (which did not discriminate against the parents' use of the room) did not violate the Establishment clause.

**Can our charter school maintain a relationship with the diocese's Catholic education department for professional development or other meetings/networking?**

Again, the answer to this question may differ according to state charter school laws, but the U.S. DOE (2014) states that charter schools may form partnerships with religious organizations for the provision of secular services (e.g., tutoring or recreational activities) (p. 23). Additionally, the charter school must select the community partner "without regard to their religious affiliation" (p. 23). Further, the activity must be open to all students and not limited to a religious group or groups (p. 23). Thus, a charter school wishing to partner with the diocese's Catholic education department must not consider religious affiliation in its decision to partner with such an organization. Additionally, the professional development or other interactions must be secular in nature, and must not limit participation based on religious affiliation.

**Can charter school students participate in sports after school with the diocese's Catholic athletic programs?**

Again, this is a possibility, but it also comes with restrictions. As stated previously, a charter school can enter into partnerships with a community group, such as the diocese's Catholic athletic program, but the purpose and activity must be secular in nature (U.S. DOE, 2014, p. 23). Athletic programs

are likely to be considered secular in nature, so long as religion is not part of the process (e.g., no prayers, hymns, religious symbols). However, the charter school must select the athletic program “without regard to their religious affiliation.” (U.S. DOE, 2014, p. 23). Thus, it may appear suspect if the charter school’s only partner is a Catholic organization if other equally or better suited partnerships are available. Further, the activity must be open to all students and not limited to a religious group or groups. (U.S. DOE, 2014, p. 23). Therefore, the charter school would have to make the activity available to all of its students.

After school activities occur outside of regular school hours, thus charter schools may advertise these religiously-affiliated activities in the same manner they would advertise activities sponsored by other community organizations. For example, in *Daugherty v. Vanguard Charter School Academy* (2000), the school policy of permitting community groups to distribute information, including religious information, was not found to violate constitutional provisions because the school was providing equal access to *all* groups.

### Conclusions and Implications

Catholic schools have been educating children in our nation’s cities for nearly two hundred years (Mitchell, 2010). Some consider Catholic schools as “national treasures” (Center for Education Reform, 2011). Supreme Court Justice Sonia Sotomayor attended Catholic elementary schools in New York and called her eight years with them a “roadmap for success” (Sahm & Stern, 2014). Yet, the Center for Education Reform report (2011) on saving Catholic schools recommended that Catholic schools reopen as charter schools only if other governance or reform models had been explored. While the goal for the current article was to explore practical and legal issues related to Catholic-affiliated charter schools, the question remains whether Catholic schools *should* consider this reform. One interest in preserving our nation’s urban Catholic schools stems from research that has found Catholic schools (largely high schools) have achieved better results for children when compared to similar students in public schools (while controlling for socioeconomic status and race). Namely, Catholic schools have shown greater high school graduation and college attendance rates, lower drop-out rates, demonstrated less risky student behaviors, and in some cases produced higher academic achievement than non-religious schools (particularly for students of color and in urban contexts) (Altonji, Elder, & Taber, 2005; Bryk et al., 1993; Coleman, 1987; Jeynes, 2002, 2008).

Catholic schools also have a proven history of providing students/families in urban centers with social support and community cohesion (Brinig & Garnett, 2014; Bryk et al., 1993; Coleman, 1987; Mitchell, 2010; Smarick, 2014). Students displaced from Catholic school closures are disproportionately low-income and of African American or Hispanic/Latino descent (Nelson, 1994). While the percentage of all children attending K-12 Catholic schools has declined, the percentage of students of color has increased (Meyer, 2007; Mitchell, 2010). Catholic schools enrolled just 11% non-white students in 1970; this increased to 27% by 2005 (Meyer, 2007). Mitchell (2010) reported that as of 2005, 44% of Catholic schools were located in urban areas and that nearly a quarter of all enrolled Catholic school students were African American or of non-majority racial or ethnic backgrounds.

Thus, urban schools, neighborhoods, and children of color have been most affected when Catholic schools have closed and opened charter schools in their places, a concern echoed by the Black Catholics United in the closure of the Washington, DC area Catholic schools and subsequent reopening as CCS (Smarick, 2009). As proponents of social justice, Catholic educators and researchers have a responsibility to examine and respond to these trends (Bradley-Levine & Carr, 2015). In short, the charter school movement offers one way for struggling Catholic schools to remain open in neighborhoods which have had a rich history with their Catholic parishes and schools. Yet, as described above, charter schools may not succeed as quick fixes. Catholic school leaders should judiciously consider opening charter schools in light of the many legal and practical challenges discussed in this article.

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